In the Supreme Court of the United States

October Term, 1976

NO. 75-1830

MARVIN A. JANSSEN
Petitioner

VS.

STATE OF IOWA
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF IOWA

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Counsel for Petitioner

On this Petition
Thomas M. Donahue
209 Main Street
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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

Petitioner respectifully prays that a Writ of Certiorari issue to review the final order or opinion of the Supreme Court of the State of Iowa entered herein on March 17, 1976, affirming the conviction of Marvin A. Janssen in the District Court of Iowa in and for Cherokee County.

OPINION BELOW

The majority and dissenting opinions of the Supreme Court of Iowa are reported at 239 N.W.2d 564. Those opinions are also printed and attached to this Petition (infra.).

JURISDICTION

The final order of the Iowa Supreme Court was made an entered on March 17, 1976, and Marvin A. Janssen's Petition for Rehearing was refused and denied by the Iowa Supreme Court on April 12, 1976, both of which are appended hereto (infra.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and Supreme Court Rule 19 (1) (a).

QUESTIONS PRESENTED

(1) Whether or not the trial Court erred in giving his instruction No. 11, whereby the jury was instructed that the analysis of the breath test was presumptive evidence that Marvin A. Janssen was under the influence of alcohol and further instructed the jury that an inference arises, which is rebuttable.

(2) Whether or not the Trial Court erred in overruling Marvin A. Janssen's motion for a mistrial because of the prosecutor's remarks in his opening statement

regarding his evidence raising a presumption of intoxication and guilt.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provision involved is Section 1 of the 14th Amendment to the Constitution of the United States of America, which provides as follows:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction hereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Marvin A. Janssen was arrested at the approximate hour of 6:30 o clock P.M. on February 19, A.D. 1975, and he was charged with Operating a Motor Vehicle While Under the Influence of Alcohol (a charge which can, in some circumstances, be considered a felony, in Iowa). Marvin A. Janssen voluntarily submitted to a breath test when commanded to do so by the Police under Iowa's Implied Consent Law.

The matter came on for trial in May, 1975, before a jury.

In his opening statement, the local Cherokee County prosecutor told the jury:

> "Now, the State of Iowa in its legislation of the motor vehicle code has given us certain standards with regard to chemical tests to determine the degree that a person is or is not under the influence of an alcoholic beverage. The Court will instruct the jury at the close of the testimony what

these standards are and what the Iowa law is with regard to the level of alcoholic content of the body which creates a presumption that the Defendant is or is not under the influence of an alcoholic beverage."

The prosecutor went on to say:

"The evidence will show that the results of this analysis are far in excess of the standard set by the State of Iowa by law which raises a -- or a presumption that the party whose sample was tested was under the influence of an intoxicating beverage."

Immediately, the Defendant, Marvin A. Janssen, requested a mistrial. Defense counsel interrupted the prosecutor's opening statement and said:

"...I object to the comments that were just made by the County Attorney...where he refers to the results of this (breath) test as raising a presumption of the Defendant's guilt. It is settled law that the Defendant has absolutely no obligation to prove himself innocent...These... comments (are) going to leave the jury with the impression that we have a burden of proof when it is coupled with the instructions that I anticipate the Court is going to give. This jury will be confused. I...move for a mistrial."

The trial Court said:

"The motion for mistrial is overruled and I find no prejudice from the remarks by the County Attorney as far as he has gone so far. So, your motion is overruled."

The trial proceeded. The results of the breath test were introduced into the evidence, over defense objections. Then the Court gave instructions, and among the instructions to the jury was the following instruction No. 11:

"A statute of this State provides that if there is evidence that a person operating a motor vehicle

upon a public highway had at the time of said operation more than ten one-hundredths of one per centum by weight of alcohol in his or her blood, the same shall be presumptive evidence that such person was then under the influence of an alcoholic beverage.

"The rule established by the foregoing statute permits the jury to infer that the Defendant was under the influence of an alcoholic beverage if it is found by the jury that at the time Defendant was driving an automobile on a public highway his blood contained more than ten one-hundredths of one per centum of alcohol by weight.

"However, such inference is not conclusive, but it is rebuttable. It does not shift the burden to Defendant to prove that he was not under the influence of an alcoholic beverage when driving nor does it change the ultimate burden of proof or deprive the Defendant of the presumption of innocence.

"In short, the result of the breath test is presumptive evidence and, like all evidence, may be accepted or rejected by you. It is still for you to determine from all the facts and circumstances proven whether the State has carried the burden of proving Defendant guilty of the offense charged beyond a reasonable doubt." (emphasis added)

Defense counsel made timely and appropriate objection and pointed out the substantial constitutional federal question that would be encountered, should the Court so instruct the jury:

DEFENSE COUNSEL: "I object to the giving of (the Court's proposed) Instruction No. 11 because it instructs the jury to look for evidence from

> the defendant and in doing this, it unfairly causes Defendant to bring forward evidence that he should not have been required to bring forward. It is in conflict with Instruction No. 4 which states that the law presumes the Defendant innocent and not guilty....I object to the giving of instruction No. 11 for the second reason and that is that the first paragraph states that a showing of ten one-hundredths of one percentum by weight of alcohol in Defendant's blood is presumptive evidence...I can't think of any instruction that (this Court) could give similar to Instruction No. 11 that would not be in conflict with Instruction No. 4 which says that the (defendant) is presumed innocent."

And the Court said:

"The objection is overrulled."

And the court gave the jury the erroneous instruction No. 11.

The jury deliberated, and returned a verdict of GUILTY. Defendant was sentenced, and he appealed to the Supreme Court of Iowa.

The appeal was orally submitted to the Iowa Supreme Court in January, 1976. At the oral submission, the Iowa Attorney General's Office admitted error on the part of the Cherokee County trial court and admitted that the cases were against their position. The Iowa Attorney General stated:

> "Although the applicable case law is clearly against the Appellee's position, it is the Appellee's belief that this Court should take this opportunity to reconsider the holdings (of four recent Iowa Supreme Court opinions). The recurring nature of this particular point (how to correctly instruct the jury regarding presumptive evidence) evidences the need for a definitive standard in the area. In the absence of direction (from the Iowa Supreme Court), trial courts will continue to erroneously employ the model instruction or formulate independent alternatives which will ultimately be reviewed by this Court (the Supreme Court of Iowa). This Court is itself divided on the proper course, as evidenced by dissents filed (in past cases). The question should be finally resolved by the promulgation of a concise instruction to be given in a case arising from Section 321.281 (the Code of Iowa).

Rather than promulgate a new instruction, as requested by the Iowa Attorney General, that will meet constitutional requirements, the Iowa Supreme Court approved the instruction given by the trial judge, which both the Defense Counsel and the Iowa Attorney General agree is erroneous.

This is a substantial case. The problem involves substantial rights. Second and third convictions of driving while intoxicated, in Iowa, constitute felonies and the consequent loss of citizenship rights and freedom.

Defendant asked for a rehearing before the Iowa Supreme Court, but the rehearing request was denied by order of the Iowa Supreme Court, made and entered on April 12, 1976.

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Iowa Supreme Court in this case and appeal has decided a federal question in a way that is not in accord with the applicable decisions of this United States Supreme Court. The Iowa Supreme Court decided an important federal question in a way that it conflicts with the applicable decisions of the United States Supreme Court and the Iowa Supreme Court has sanctioned such a departure from the accepted and usual course regarding the presumption of innocence that we must call for an exercise of the power of the United States Supreme Court to supervise.

The substantial federal question involves the 14th Amendment to the United States Constitution, and its due process clause. Due process requires that all Iowa courts presume the criminal defendant innocent and that the courts cast no burden of proof whatsoever on the defendant. The State has the whole duty of proving each and every one of the elements of the offense charged beyond all reasonable doubt.

The United States Supreme Court has stated standards regarding the presumption of innocence which is part of the Constitution's due process requirement:

> Instructions are erroneous when "they assume that the parties are guilty" when "they call upon the parties to establish their innocence." Such instructions "subvert the presumptions of innocense and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable."
>
> From Cummins v. State of Missouri
> 4 Wall 277, 18 L.Ed 356 (1866)

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."

From Coffin v. United States
156 U.S. 432, 453; 15 S.Ct.
394; 39 L.Ed. 481 (1895)

"Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."

From Speiser v. Randall
357 U.S. 513, 525-526, 78 S.Ct.
1332, 2 L.Ed.2d 1460 (1958)

This instruction No. 11 given by the Iowa trial court is erroneous because it shifts the burden of persuasion of an essential element of the crime and thus requires the defendent to assume the onus of proving a negative averment, i.e. nonintoxication. The comments made by the prosecutor, in his opening statement, are even more erroneous and are even more flagrant than the instruction because he said that his evidence will raise a presumption that Marvin A. Janssen was intoxicated. The Court's instruction reinforces and gives support and credibility to the prosecutor's wrongful statements to the jury. When this jury went to deliberate, they had been thoroughly instructed that the evidence of the results of the breath test raised a presumption of intoxication.

The trial court told the jury that the inference was not "conclusive", but was "rebuttable". Rebuttable by whom? Obviously, rebuttable by the Defendant. The prosecutor told the jury that intoxication was presumed and the judge instructed the jury that Defendant could have rebutted the inference with his own evidence.

Remember, that in this case, the Attorney General of Iowa agreed in his brief and at oral submission of the appeal to the Iowa Supreme Court, that the instruction was erroneous and that the case law went against the State's position. The Iowa Supreme Court was divided. Three (3) Iowa Supreme Court Justices dissented when the majority departed from the accepted and usual concepts of due process of law and of the presumption of innocence.

The dissenting justices in the Iowa Supreme Court were unable to distinquish the Instruction No. 11 from the instructions disapproved by the Iowa Supreme Court in State v. Hansen, 203 N.W.2d 216 (Iowa, 1972); State v. Sloan, 203 N.W.2d 225 (Iowa, 1972); State v. Hutton, 207 N.W.2d 581 (Iowa, 1973); and State v. Prouty, 219 N.W.2d 675 (Iowa, 1974).

Instruction No. 11 states that an inference arises which must be rebuttable. This places an unconstitutional burden on the Defendant because it leads the average juror to expect the Defendant must come forth with evidence to disprove the results of the breath test before he could be found innocent.

The Iowa Courts are permitting a shift in the burden of proof in cases involving the inference that a person possessing recently stolen goods, stole the goods. State v. Thornburgh, 220 N.W.2d 579 (Iowa, 1974). Now, with this Janssen case, the burden of proof is being shifted again to a criminal defendant in an OMVUI case. If Certiorari is not granted, the Iowa Courts might continue to steer away from the fundamental and established concepts of due process, burden of proof, presumption of innocence and proof beyond a reasonable doubt.

The question of whether due process is denied when:

(a) The prosecutor says that his evidence will raise a presumption of intoxication, and

(b) The Court instructs the jury that the State's evidence raises an inference which is not "conclusive", but can be "rebutted"

has been decided by this Court. Iowa cases do not always square with the opinions of this Court. This Janssen opinion does not even square with recent Iowa opinions. We present to this Court a fundamental question for review, and we think and assert that it is important for this Court to exercise its power to require the Iowa courts to steer back to established concepts of due process of law.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the opinion and final decision of the Supreme Court of Iowa and also to review its denial of the Petition for Rehearing.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	Filed March 17, 1976
	)	
Appellee	)	
	)	32
vs.	)	58448
	)	
MARVIN A. JANSSEN,	)	
	)	
Appellant	)	

Appeal from Cherokee District Court--Edward F. Kennedy, Judge.

Appeal by defendant from sentence on verdict of guilty on charge of operating motor vehicle while under influence of intoxicants.--Affirmed.

Morris C. Hurd and Thomas M. Donahue, of Ida Grove, for appellant.

Richard C. Turner, Attorney General, William D. Scherle, Assistant Attorney General, and James L. McDonald, Cherokee County Attorney, for appellee.

Considered en banc.

UHLENHOPP, J.

This appeal involves several rulings of the trial court in the trial of defendant Marvin A. Janssen on an indictable misdemeanor charge.

The Cherokee County Attorney charged defendant with operating a motor vehicle while under the influence of an alcholic beverage on February 19, 1975. Defendant pleaded not guilty. The testimony at trial of

observations by witnesses abundantly established defendant's intoxication. In addition, the State showed that a sample of defendant's breath reflected a blood-alcohol equivalent of 130 milligram percent. A jury found defendant guilty and the trial court imposed sentence. Defendant appealed, assigning four errors.

I. Defendant first contends that the trial court erred in overruling his exceptions to Instruction 11 relating to § 321.281 of the Code. This instruction states:

> A statute of this State provides that if there is evidence that a person operating a motor vehicle upon a public highway had at the time of said operation more than ten one-hundredths of one percentum by weight of alcohol in his or her blood, the same shall be presumptive evidence that such person was then under the influence of an alcholic beverage.
>
> The rule established by the foregoing statute permits the jury to infer that the Defendant was under the influence of an alcholic beverage, if it is found by the jury that at the time Defendant was driving an automobile on a public highway his blood contained more than ten one-hundredths of one percentum of alcohol by weight.
>
> However, such inference is not conclusive, but it is rebuttable. It does not shift the burden to Defendant to prove that he was not under the influence of an alcoholic beverage when driving nor does it change the ultimate burden of proof or deprive the Defendant of the presumption of innocence.
>
> In short, the result of the breath test is presumptive evidence and, like all evidence, may be accepted or rejected by you. It is still for you to determine from all the facts and circumstances proven whether the State has carried the burden of

proving Defendant guilty of the offense charged beyond a reasonable doubt.

Defendant argues that this instruction comes within the proscription of State v. Hansen, 203 N.W.2d 216 (Iowa); State v. Sloan, 203 N.W.2d 225 (Iowa); State v. Hutton, 207 N.W.2d 581 (Iowa); and State v. Prouty, 219 N.W.2d 675 (Iowa). We think, however, that the trial court carefully and successfully avoided the problem in those cases and brought itself instead under State v. Thornburgh, 220 N.W.2d 579 (Iowa).

A trial judge in a criminal case involving a presumption relating to guilt must avoid two pitfalls. First, the judge must not tell the jury that the presumption is conclusive. State v. Hansen, 203 N.W.2d 216, 220 (Iowa). Second, the judge must not tell the jury that the presumption shifts the burden of proof to the defendant. State v. Hutton, 207 N.W.2d 581, 583 (Iowa).

As to the first of these pitfalls, presumptions in the law are of two types, conclusive and rebuttable. McCormick, Evidence (2d ed.) § 342 at 804. The trial court here clearly negatived any thought that the presumption established by § 321.281 is of the conclusive type and plainly stated that the presumption--or inference, as the court called it--is rebuttable. In the third paragraph of Instruction 11 the trial court stated, "However, such inference is not conclusive, but it is rebuttable." The court buttressed this statement in the first sentence of the fourth paragraph: "In short, the result of the breath test is presumptive evidence and, like all evidence, may be accepted or rejected by you." Both of these quoted statements were consistent with the first sentence of the second paragraph of the instruction: the rule established by the statute "permits" the jury "to infer" that defendant was under the influence. The trial court avoided the first pitfall.

As to the second pitfall which a trial judge must

avoid--not to tell the jury that the defendant has the burden of proof--we must consider each of the four paragraphs of the instruction. The first paragraph merely informs the jury of the existence of the statutory presumption. This court has held such language proper. State v. Hansen, 203 N.W.2nd 216, 219-220 (Iowa). The second paragraph does not deal with burden of proof; it merely tells the jury the statute permits the jury to infer. The third paragraph tells the jury the inference is not conclusive but is rebuttable, and informs the jury that the inference does not shift the burden to defendant to prove that he was not under the influence nor change the ultimate burden of proof or deprive defendant of the presumption of innocence. The fourth paragraph tells the jurors they may accept or reject the statutory presumptive evidence. It also informs the jurors that they must find from all the proven facts and circumstances whether the State has sustained its burden of proving defendant guilty beyond a reasonable doubt. None of these paragraphs casts the burden of proof on defendant.

Defendant points to the first sentence of the third paragraph:

> However, such inference is not conclusive, but it is rebuttable.

This compound sentence contains two parts. The first part does not say that defendant has the burden of proof; it simply and correctly informs the jury that the inference "is not conclusive." The jury is entitled to know this.

The second part of the sentence states that the inference "is rebuttable." Defendant argues this tells the jury that he has the burden to rebut it, and he cites the line of cases beginning with State v. Hansen, 203 N.W.2d 216 (Iowa).

The instruction in those cases, however, contained a second sentence which this trial court omitted. The paragraph involved in those cases read:

> However, such inference is not conclusive, but is

rebuttable. **It may be overcome or rebutted by evidence to the contrary.** (Emphasis added.)

This court held the emphasized language we have quoted might have caused the jury to think the **defendant** had to produce evidence to dispel the inference. This is shown by the following passage from State v. Hansen, 203 N.W.2d 216, 220 (Iowa): "We recognize the instruction now under attack does not specifically require **defendant** to produce rebutting testimony; but it does demand that someone--either defendant or the State--do so **when it tells the jury the blood test results 'may be overcome or rebutted by evidence to the contrary.'"** (Latter emphasis added.)

This court has found language unobjectionable which is very similar to the second part of the sentence now before us--the inference "is rebuttable." The lastest case in the Hansen series was decided on June 26, 1974, State v. Prouty, 219 N.W.2d 675 (Iowa). On July 31, 1974, this court decided State v. Thornburgh, 220 N.W. 2d 579, 585 (Iowa). That case involved the common-law inference that a person possessing recently stolen goods stole the goods. As in the present case, the trial judge in that case omitted the objectionable language in Hansen: "may be overcome or rebutted by evidence to the contrary." After setting forth the inference, the instruction in the Thornburgh case read:

> The inference of theft may be rebutted.

While this court stated it may be considered advisable to omit that sentence, the court held the inclusion of the sentence was not subject to the challenge of casting the burden on the defendant; hence the court did not sustain the assigned error. The court adverted to the absence of the language found objectionable in Hansen regarding evidence to rebut the inference: "The instruction is not subject to the attack directed to the paragraph quoted earlier from the instruction considered in **Hansen** and those cases following that

decision since it does not at any point convert the inference arising from the unexplained possession of recently stolen property into a conclusive presumption of guilt **if evidence is not produced to rebut it.**" 220 N.W.2d at 586 (emphasis added). Exactly the same may be said about the sentence in the present case, except that this sentence is stronger for defendant since it expressly adds that the inference is **not** conclusive. It is true that the Thornburgh instruction uses the word "rebutted" while the present one uses "rebuttable," but this variation does not seem significant.

We hold that defendant's exception to Instruction 11 is not well taken. The omission of the phrase "but it is rebuttable" in future instructions would possibly avoid appeals of this type. See II Iowa Uniform Jury Instructions, No. 520.8 (1970).

II. Defendant next contends that Instruction 11 conflicts with the evidence in that the State's expert expressed the result of the test in "milligram percent" rather than "hundredths of a percent" and also indicated on cross-examination that in his opinion a person would not be intoxicated at ten one-hundredths of a percent, the percent stated in § 321.281 of the Code.

The testimony shows, however, that the expert equated milligram percent to hundredths of a percent. At one point he testified:

> The breath sample was found to contain alcohol corresponding to blood alcohol level of 130 milligram percent. Thirteen hundredths of one percent.

We do not find merit in the first part of defendant's objection.

The expert testified on cross-examination that at 50 to 60 milligram percent, alcohol has no effect; from 60 to 200 the effect becomes more and more visible--loss of motor coordination, loss of inhibitions, slurred speech, clammy skin; above 200 the person would be drunk or intoxicated, completely under the influence--very poor

motor coordination, staggering, very great loss of inhibitions; at 300 to 500 the symptoms keep increasing with most persons ''passing out'' at about 400; and at 500 death may occur.

We first do not agree that on the basis of this cross-examination a jury could not find a person under the influence of an intoxicating beverage at 130 milligram percent. But even if the expert's testimony tended in the direction defendant contends, the trial court would still be required to submit the case to the jury on the basis of the statutory inference. The cross-examination would merely rebut that inference.

We find no error here.

III. Defendant's third assignment of error is that the trial court erred in admitting the results of the breath test because the State introduced no evidence (1) that the devices and methods used by the officers were those approved by the Iowa Commissioner of Public Safety and (2) that in administering the test the officers used the approved devices and methods.

The State introduced extensive evidence at trial that the breathalizer test was approved by the Commissioner and how the test is administered--with an officer demonstrating its use before the jury.

The trial court record on which defendant must rely under his third assigned error was made during the testimony of an expert witness. The State called the expert to testify to the result of the breath test. After the usual testimony as to the qualifications of the witness and receipt and analysis of the breath sample, the county attorney asked the witness to state the result of the analysis. Defense counsel thereupon made an objection in the jury's presence. He completed two of his grounds of objection and started a third one: ''Third, I think the case of State v. Hanson excludes--''. At this point the prosecutor objected that defense counsel was making an argument. The trial judge overruled defendant's objection, said that defense counsel was really making an argument in the presence

of the jury, and stated that he and counsel would go from the room if defense counsel desired to dictate his objection into the record. Defense counsel stated he desired to make more record and counsel and the court went into chambers. Defense counsel then stated:

> I made an objection which you have overruled and I would like to have the Court reconsider that. I gave two reasons in the courtroom and was giving my third reason when we adjourned here.
>
> The third reason that I think the Court should reconsider its ruling on my objection is that there must be a showing that standards were adopted by the Commissioner and if adoptive (adopted?), what they were. Those standards should relate to the devices and methods used in administering chemical tests under Section 321B. 4 of the Code of Iowa.
>
> There is nothing in the record to show that any Commissioner set up any standards except by hearsay and I don't think that is sufficient. I think this second officer, Bliel, shouldn't have convinced the Court by any kind of competent evidence that the Commissioner did set up these standards.
>
> I might just for the record indicate to you that Mr. Michael Sellers is the man who assured the legislature over and over again that he had plenty of--assured his tracis-computer and the legislature found that he didn't have anything on that. I think the court has reason to believe that the Public Safety makes mistakes, and I think it is possible that they never did set up any devices and methods as required by this--the Supreme Court, and they don't have any standards set up by the Commissioner. I don't think that this test result should be admitted into the evidence and I don't think the jury should be informed of it. The case was rendered and decided in 1972 and I think the Commissioner has had time to approve devices and methods and set up

standards and there is no evidence here that he has.

Counsel then argued the objection. Defendant does not now urge the first two grounds of his objection--relating to addressing and mailing the sealed sample--and we give no consideration to them. As to the third ground, defense counsel argued to the trial court:

> And lastly, if (the prosecutor) thinks we are knit-picking or getting too technical, all I am asking is the Court is to require what the Supreme Court requires in State versus Hanson, and that is showing that the Commissioner did set up standards as to the administering of these tests and as to the approval of devices and methods in administering the tests. There is no showing that this has been done by the Commissioner.

At the conclusion of this discussion in chambers, the court overruled defense counsel's objection.

Defense counsel made the third ground of his objection very clear in chambers: the State had not shown that the Commissioner had set up standards relating to devices and methods for the tests and what those standards are. The State meets this third ground head-on by arguing before us that the Commissioner had in fact adopted such standards: that they are incorporated in rules set out in 1973 Iowa Departmental Rules 788; and that the prosecutor was not required to prove those rules any more than the statutes, since the courts take judicial notice of them, citing State v. Berch, 222 N.W.2d 741 (Iowa).

We think however that this third assigned error turns on another point. Defendant does not now argue the third ground of his objection that the prosecutor did not show the Commissioner had adopted standards and what they are. Indeed, in his brief defendant quotes those standards verbatim from Iowa Departmental Rules. Defendant now takes a different tack. He argues the Commissioner adopted standards but the

prosecutor did not show that the devices and methods the officers **used** here were the ones which the Commissioner approved. That is not the contention defendant made in the trial court. We do not know how the trial court would have ruled on the contention defendant now makes or whether the prosecutor would have introduced further foundation evidence. Defendant's objection in the trial court was different from his present assigned error, and we therefore do not consider the assigned error. State v. Coffee, 182 N.W.2d 390 (Iowa); State v. Mayhew, 170 N.W.2d 608 (Iowa), second app. 183 N.W.2d 723; State v. Torrence, 257 Iowa 182, 131 N.W.2d 808. We do not intimate that the assigned error would be well taken had defendant objected on that basis in the trial court.

IV. Defendant's final assignment of error is unsupported by citation of any authority, and we do not consider it. State v. Mattingly, 220 N.W.2d 865 (Iowa).

Defendant's motion submitted with the appeal is sustained.

AFFIRMED.

All Justices concur except McCormick, Rawlings, and LeGrand, JJ. who dissent.

McCORMICK, J. (Dissenting from Division I).

I am unable to distinguish instruction 11 from the instructions disapproved by this court in State v. Hansen, 203 N.W.2d 216 (1972), and its progency.

The vice in the instruction in **Hansen** was its third paragraph which provided:

> "However, such inference is not conclusive, but is rebuttable. It may be overcome or rebutted by evidence to the contrary."

Instruction 11 in the present case contained the first but not the second sentence of this disapproved paragraph. The remaining language in instruction 11 is not substantially different from that held inadequate in State v. Hutton, 207 N.W.2d 581 (Iowa 1973), to cure

the deficiency in the disapproved paragraph in the **Hansen** instruction.

The question here is whether the vice in the **Hansen** instruction is cured by elimination of the second sentence of the two-sentence disapproved paragraph.

In the first sentence the jury is told, "However, such inference is not conclusive, but is rebuttable." The second sentence tells the jury how the inference can be rebutted: "It may be overcome or rebutted by evidence to the contrary". In **Hansen** we said this paragraph converts the inference to a conclusive inference if evidence is not produced to rebut it: "This is the same as instructing the jury that the presumption is conclusive **unless** rebutted by evidence to the contrary; and we say this is error." 203 N.W.2d at 220.

The majority opinion here finds a difference between the message conveyed in the offensive paragraph of the **Hansen** instruction and the message conveyed in the challenged paragraph of instruction 11. I do not. I do not believe any substantive difference in meaning exists between the portion of the first sentence which says "but is rebuttable" and the second sentence in the **Hansen** instruction which told the jury, "It may be overcome or rebutted by evidence to the contrary". How else would a rebuttable inference be rebutted? The problem here, as in **Hansen**, originates in the implication from the use of the word "conclusive" in the first sentence. In its haste to tell the jury the inference is not conclusive the court qualifies it only by pointing out it is rebuttable, i.e., it may be overcome by evidence. The implication is that if it is not rebutted, it **is** conclusive. However, at the core of the holding in **Hansen** and its progeny is the concept that the jury must not be led to believe the inference is conclusive unless rebutted. Even in the absence of rebutting evidence, the inference is not conclusive. The jury is free to refuse to give any weight to the inference. It is only when the jury does choose to give it weight that the fact it is rebuttable has significance.

The vice of the **Hansen** instruction was overcome in the instruction approved by this court in State v. Berch, 222 N.W.2d 741 (Iowa 1974). The **Berch** instruction was substantially the same as Uniform Bar Instruction 520.8, which is as follows:

> "A statute of this State provides that if there is evidence that a person operating a motor vehicle upon a public highway, had at the time of said operation, more than ten one-hundredths of one percentum by weight of alcohol in his or her blood, the same shall be presumptive evidence that such person was then under the influence of an alcoholic beverage.
>
> "The rule established by the foregoing statute permits, but does not require, the jury to infer that the defendant was under the influence of an alcoholic beverage if it is found by the jury that at the time defendant was driving an automobile on the public highway his blood contained more than ten one-hundredths of one percentum by weight of alcohol."

Compare II Uniform Jury Instructions, Criminal, No. 520.8 (1973) with State v. Berch, supra, at 745-746. In **Berch** this court held the trial court properly refused a requested instruction which included the first sentence of the paragraph disapproved in **Hansen.** 222 N.W.2d at 746.

State v. Thornburgh, 220 N.W.2d 579 (Iowa 1974), relied on in the majority opinion, is distinguishable. There the instruction did not say an inference could avoid being conclusive if rebutted. The instruction did not attempt to explain the inference in negative terms. It did not include either sentence of the offensive paragraph in Hansen. Instead it informed the jury that if the State proved the defendant was in recent possession of stolen property, "then you may, **but are**

not required to, infer that defendant stole it''. It is true the instruction also told the jury, ''The inference of theft may be rebutted.'' However, this was not part of a statement like the first sentence of the **Hansen** paragraph and did not suggest a failure of rebuttal evidence would make the inference conclusive. It was in a context in which emphasis was given to the mere permissive nature of the inference in the first place. Nevertheless, to avoid the possibility of misunderstanding, we suggested the statement be omitted on retrial.

I would hold the instruction here comes within the **Hansen** case rather than the Thornburgh case and would reverse and remand for new trial.

Rawlings and LeGrand, JJ., join in this dissent.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Appellee	)	
	)	No.58448
vs.	)	
	)	
MARVIN A. JANSSEN,	)	
	)	ORDER
Appellant.	)	

Petitioner-appellant's petition for rehearing in the above entitled appeal has been considered by the full membership of the court and is now refused and denied.

Done this 12th day of April, 1976.

/s/ C. Edwin Moore
Chief Justice-Iowa Supreme Court

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